U.S. Department of Labor

Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400-N
Washington, D.C. 20001-8002

Tel (202) 565-5330 FAX (202) 565-5325

Date Issued: March 21, 2000

Case No.: 2000-INA-0017

In the Matter of:

INFINITY CHIC OF EUROPE, INC., *Employer*,

on behalf of

WIOLETTA PORACKA, *Alien*.

Appearance: Eunice Becker, Esq.

Certifying Officer: Dolores Dehaan, Region II

Before: Burke, Huddleston, and Neusner
Administrative Law Judges

RICHARD E. HUDDLESTON
Administrative Law Judge

DECISION AND ORDER

The above action arises upon the Employer's request for review pursuant to 20 C.F.R. § 656.26 (1991) of the United States Department of Labor Certifying Officer's ("CO") denial of a labor certification application. This application was submitted by the Employer on behalf of the above-named Alien pursuant to § 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A) ("Act"), and Title 20, Part 656, of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under § 212(a)(5) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and, (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good-faith test of U.S. worker availability.

We base our decision on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File,[1] and any written argument of the parties. 20 C.F.R. § 656.27(c).

Statement of the Case

This case arises from an application for labor certification filed by Infinity Chic of Europe on August 5, 1996, seeking labor certification for Wioletta Poracka, Alien, for the position of Floor Manager (AF 6). Employer did not require any education or training, but required 2 years experience in the job offered. The duties of the job were described as follows:

> Supervises & coordinate the activities of workers in production of ladieswear and handbags. Checks products for defects, quality control, conformance to specs, train workers using juke machine, merrow machine.

The Certifying Officer (CO) issued a Notice of Findings (NOF) proposing to deny certification on July 16, 1999, on the grounds that three qualified U.S. applicants were rejected for other than lawful job-related reasons, in violation of 20 C.F.R. § 656.21(b)(6) and § 656.20(c)(8). (AF 67). The Employer was directed to provide proof of attempts to contact the applicants.

Employer submitted rebuttal on August 20, 1999, which consisted of a letter from Employer's attorney, which was subscribed by "illegible signature" For Infinity Chic of Europe, Inc. The one page letter indicates that the applicants were contacted by telephone and interviewed. (AF 78).

The CO issued a Final Determination denying certification on September 10, 1999, on the same grounds stated in the NOF. (AF 80). Employer requested administrative-judicial review of the denial on September 21, 1999.

Discussion

Section 212(a)(14) of the Immigration and Nationality Act of 1952 (amended by § 212(a)(5)(A) of the Immigration Act of 1990 and recodified at 8 U.S.C. § 1182(a)(5)(A)) was enacted to exclude aliens competing for jobs American workers could fill and to "protect the American labor market from an influx of both skilled and unskilled foreign labor." *Cheung v. District Director, INS*, 641 F.2d 666, 669 (9th Cir. 1981); *Wang v. INS*, 602 F.2d 211, 213 (9th Cir. 1979). To achieve this Congressional purpose, the regulations set forth a number of provisions designed to ensure that the statutory preference favoring domestic workers is carried out whenever possible. Twenty C.F.R. § 656.2(b) quotes § 291 of the Immigration and Nationality Act, 8 U.S.C. § 1361, as follows:

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[1] All further references to documents contained in the Appeal File will be noted as "AF *n*," where *n* represents the page number.

Whenever any person makes application for a visa or any other document required for entry, or makes application for admission, or otherwise attempts to enter the United States, the burden of proof shall be upon such person to establish that he is eligible to receive such visa or such document, or is not subject to exclusion under any provision of this Act...

The legislative history of the 1965 amendments to the Act establishes that Congress intended that the burden of proof for obtaining labor certification be on the employer who seeks an alien's entry for permanent employment. *See* S. Rep. No. 748, 89th Cong., lst Sess., *reprinted in* 1965 U.S. Code Cong. & Ad. News 3333-3334.

An employer must show that U.S. applicants were rejected solely for lawful job-related reasons. 20 C.F.R. § 656.21(b)(6). Furthermore, the job opportunity must have been open to any qualified U.S. worker. 20 C.F.R. § 656.20(c)(8). Therefore, an employer must take steps to ensure that it has obtained lawful job-related reasons for rejecting U.S. applicants, and not stop short of fully investigating an applicant's qualifications. The burden of proof for obtaining labor certification lies with the employer. 20 C.F.R. § 656.2(b).

The CO's NOF required the Employer to provide documentation of attempts to contact the applicants, including telephone records, certified mail receipts, etc. Employer's response was to assert in a letter that the applicants were contacted and interviewed by telephone, but rejected; and that telephone records were not available to provide to document this contact.

Employer also argues that "There is nothing in the record which indicates that the applicants were not actually contacted." (AF 78). The implication is that if there is nothing in the record to contradict the Employer's assertion regarding contact, it should be accepted. Employer's argument indicates a basic misunderstanding of the burden of proof in a labor certification case. The burden proof rests entirely with the Employer.

An employer, as in the instant case, who interviews applicants by telephone with no corroborating documentation whatsoever, does so at the risk of failing to meet his burden of proof under the Act. The CO does not have the burden of proving otherwise. Therefore, the following Order shall issue.

Order

The Certifying Officer's denial of labor certification is hereby AFFIRMED.

For the Panel:

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RICHARD E. HUDDLESTON
Administrative Law Judge

NOTICE OF PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless, within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such a review is not

favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions for such review must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with the supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of a petition, the Board may order briefs.